NO. 48862-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANCISCO GUZMAN RODRIGUEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Honorable G. Helen Whitener, Judge

No. 15-1-02196-8

BRIEF OF RESPONDENT

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2. Whether the Court should decline to address the award of appellate costs when the State has yet to substantially prevail and has not submitted a cost bill to which defendant may object?

B. STATEMENT OF THE CASE.

1. Procedure

On June 5, 2015, the Pierce County Prosecutor's Office (State) charged Francisco Guzman Rodriguez with one count of attempted murder in the first degree. CP 1. On March 1, 2016, the State amended the information adding one count of assault in the first degree with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death, or in the alternative inflicts great bodily harm. CP 18-20. The State amended the information a second time on March 10, 2016, removing from both counts the aggravating circumstance the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. CP 27-29. Each count included the aggravator of a domestic violence offense. CP 18-20, 27-29.

Following trial, a jury found defendant guilty of attempted murder in the second degree and assault in the first degree on March 22, 2016. CP 77, 79. By special verdict, the jury found both counts were aggravated domestic violence offenses. CP 78, 81. On March 23, 2016, Defendant was given a standard range sentence for both counts plus an enhancement of 48 months for the attempted murder in the second degree conviction. CP 90-103. The trial court imposed mandatory legal financial obligations. CP 94. Defendant filed a timely notice of appeal. CP 121-123.

2. Facts

On June 3, 2015, Leonila Mejia was living in an apartment with defendant and her four children. 6RP 32-33. When Mejia returned from errands on the night of June 3rd, she and defendant had a conversation regarding the end of their romantic relationship, the division of belongings, and the fact that Mejia wanted to move out. 6RP 38-39. Following the conversation, Mejia went to bed in the bedroom where two of her children were sleeping. 6RP 39. Her three year old daughter shared the bed with Mejia. 6RP 40. Mejia fell asleep sometime after midnight. 6RP 42. She awoke when she felt defendant getting on the bed. 6RP 43. Defendant was kneeling on the bed on his knees and had a scarf in his hands. 6RP 44. Mejia asked defendant what he was doing to which he replied that he had to do it, he had to kill her, and she was not going to leave. 6RP 44. After telling her he had to kill her, defendant put the scarf around Mejia's neck. 6RP 44. He had the scarf wrapped around each of

his hands and wrapped it around her neck one time, pulling the scarf tight by both ends. 6RP 45-46. Mejia tried to yell for her daughter while trying to grab the scarf and push defendant away. 6RP 46. While she was struggling with defendant, he told her he was sorry but he had to do it, he had to kill her. 6RP 47.

During the struggle, defendant and Mejia fell off of the bed and onto the ground. 6RP 47. Mejia fell on top of defendant who let go of her. 6RP 47. It was at this time that Mejia asked defendant to stop and "to think about it really well, that he should think about the children." 6RP 47. Defendant responded that he didn't care. 6RP 47. Mejia continued to plead with him, telling him "look, the children are sleeping." Defendant said again that he didn't care. 6RP 47. Mejia got up from the ground and defendant stood up; he no longer had the scarf in his hands. 6RP 48. When Mejia tried to leave the bedroom, defendant grabbed her by the neck with both of his hands and started squeezing. 6RP 48. Mejia was unable to scream and she started to feel unable to breathe. 6RP 49. Then she felt a sharp pain in her head, felt a loud ringing in her ears, and could not see. 6RP 49, 51. Defendant did not say anything during the time he was strangling her with his hands. 6RP 50.

At some point, Mejia made her way out of the room and into the kitchen. 6RP 52. Defendant remained in the bedroom. 6RP 52. Mejia went into the bathroom and saw in the mirror that her face was purple and her eyes were red. 6RP 52. Defendant screamed at Mejia to open the door to

the bathroom. 6RP 53. He attempted to get into the bathroom for approximately ten minutes before Mejia's children came out of the bedroom. 6RP 82. Her older daughter knocked on the bathroom door stating Mejia's son needed to use the bathroom. 6RP 83. When Mejia opened the door, she told her daughter to call the police. 6RP 83-84. Defendant left the apartment before the police arrived. 6RP 86-87. Mejia was transported to a hospital. 6RP 88. Officer Welsh responded and after contacting Mejia and gathering some information from her older daughter, located defendant who appeared to be intoxicated. 5RP 47-49, 50-51. Defendant was transported to Tacoma Police Headquarters and arrested. 7RP 41, 67.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS AND SENTENCE FOR ATTEMPTED MURDER IN THE SECOND DEGREE AND ASSAULT IN THE FIRST DEGREE DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE THE CRIMES ARE NOT IDENTICAL IN LAW NOR IN FACT.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Washington State Constitution similarly mandates that no person shall "be twice put in jeopardy for the same offense." Wash. Const. Art. I, Sec. 9. "Washington's double jeopardy clause is coextensive with the federal

double jeopardy clause and is given the same interpretation the [United States] Supreme Court gives to the Fifth Amendment." ***State v. Turner***, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. ***State v. Vladovic***, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). "The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions." ***State v. Michielli***, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997).

However, the legislature may constitutionally authorize multiple punishments for a single course of conduct. ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). An appellate court first considers express or implicit legislative intent based on the criminal statutes involved. ***Calle***, 125 Wn.2d at 776. If the statutory language is silent, the courts turn to the "same evidence" test, also known as the "***Blockburger***[1] test." Under the test, two offenses are the same for purposes of double jeopardy when they are "identical both in fact and in law." ***State v. Baldwin***, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003).

[1] ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

a. Attempted murder in the second degree and assault in the first degree are not identical in law.

The statutory language is silent as to whether attempted murder in the second degree and assault in the first degree are the same for purposes of double jeopardy, so we turn to statutory interpretation. ***State v. Valentine***, 108 Wn. App. 24, 27, 29 P.3d 42 (2001). Two offenses are not the same in law if each offense includes an element not included in the other and proof of one offense would not necessarily prove the other. ***Baldwin***, 150 Wn.2d at 454. Under the same evidence test, the two crimes are not the same. ***Valentine***, 108 Wn. App. at 27. Attempted murder necessarily includes the element of intent to cause the death of another while assault does not; the intent element for assault in the first degree is to inflict great bodily harm. RCW 9A.32.050(1)(a); RCW 9A.36.011; ***Valentine***, 108 Wn. App. at 27. First degree assault necessarily includes the element of assaulting another whereas attempted murder does not. *Id.* The substantial step necessary to prove attempted murder need not be an assault. *Id.* To prove the first degree assault, the State had to prove defendant engaged in an assaultive act which is an element not required to prove attempted murder.

Courts consider the elements as the State charged and proved in assessing whether the crimes are the same in law. ***State v. Davis***, 174 Wn. App. 623, 633, 300 P.3d 465 (2013). The State charged defendant with

attempted murder in the first degree and assault in the first degree. CP 1, 18-20, 27-29. To prove attempted murder in the first degree, the State had to show defendant took a substantial step towards causing the death of another with premeditated intent to cause the death of another. RCW 9A.28.020; RCW 9.9A.32.030. Conduct that strongly corroborates defendant's criminal purpose constitutes a "substantial step." ***In re Borrero***, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007).

The State presented evidence of defendant's premeditated intent to kill and the substantial step he took to do so. Defendant explicitly stated his intent to kill Mejia. 6RP 44. Mejia's testimony regarding those statements was sufficient to prove the intent element of murder. Defendant's conduct strongly corroborated his criminal purpose. Mejia's testimony detailing how defendant approached her with a scarf wrapped around each of his hands was sufficient for a jury to find defendant took a substantial step towards committing murder. *See* ***Davis***, 174 Wn. App. at 634 (defendant took a substantial step towards murder when he retrieved a weapon and moved towards the victim). That defendant went into the bedroom where Mejia was sleeping, retrieved a scarf, wrapped it around his hands, approached Mejia, and responded to her inquiry with his explicit intent to kill her, all support a showing of premeditated intent to cause her death and the substantial step he took to further his purpose. The evidence presented in support of the charge of attempted murder in the first degree was independent from the evidence presented in support of the

assault in the first degree. Had defendant been interrupted after approaching Mejia with the scarf in his hands and after he told her he had to kill her, the assault in the first degree would not have occurred. Assaultive acts were not essential to proving the elements of attempted murder as charged.

Further, the acts committed by defendant constituting a substantial step towards committing murder in the second degree were insufficient to prove assault in the first degree. The following elements must be met:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or ... (c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011(1)(a),(c). Simply stating his intent to kill and approaching Mejia with an article used to kill, in this case a scarf, does not satisfy those elements. At this point in time, defendant had not assaulted Mejia, the scarf he held was not a deadly weapon yet, nor was force applied that would likely produce any kind of bodily harm, much less great bodily harm or death.

Although there is case law which provides that assault in the first degree and attempted murder are the same in law, this is not true in the present case. ***Davis***, 174 Wn. App. at 632; ***In re Orange***, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). In ***Orange***, the analysis of whether the two offenses were the same in law turned on the fact that the assaultive acts

were used to prove the attempted murder. ***Orange***, 152 Wn.2d at 820 ("proof of attempted murder committed by assault will always prove an assault"). The Court in ***Davis*** focused on an analysis of whether the offenses were the same in fact because the State in that case also conceded they were the same in law. ***Davis***, 174 Wn. App. at 632. As argued above, the attempted murder in this case was not committed by an assault nor was the assault proved by the acts constituting attempted murder, distinguishing this case from ***Orange*** in this respect.

Because proof of either crime did not necessarily prove the other and because the intent element is different for each crime, the offenses are not identical in law; therefore, the double jeopardy clause does not prevent convictions for both offenses.

b. Defendant's acts constituting attempted murder in the second degree and assault in the first degree were not identical in fact.

If one crime begins after the other crime is over and thus different evidence supports each conviction, then the two crimes are not the same in fact. ***Davis***, 174 Wn. App. at 633 (*citing* ***State v. Noltie***, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)). However, it is also not dispositive if the same conduct is used to prove each crime. ***State v. Freeman***, 153 Wn.2d 765, 777, 108 P.3d 753 (2005) (*citing* ***United States v. Dixon***, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993)).

The attempted murder in the second degree and the assault in the first degree in this case were two separate and distinct acts.[2] The distinction between the two crimes was accentuated by the change in location, the change in means, and the conversation in which defendant and Mejia engaged. As argued in the previous section, defendant completed the crime of attempted murder while Mejia was on the bed when he got onto the bed with the scarf. He assaulted Mejia with his hands while she was standing on the floor after she attempted to leave the bedroom. 6RP 48. In between the attempt with the scarf and the manual strangulation, Mejia begged defendant to stop and asked him to think of the children, to "think about it really well." 6RP 47. Defendant responded to her plea by telling her he didn't care. 6RP 47. She continued to plead with him and brought up the children a second time; defendant gave the same response to this second plea. 6RP 47. During this time, defendant had the opportunity to pause and think about his actions and specifically about the effect of his actions on the children there in the apartment. He did so and decided that he "didn't care," choosing to proceed with further criminal activity. 6RP 47. The assault in the first degree began after the

[2] Although the State conceded at trial that the two crimes constituted same criminal conduct and the trial court so ruled, it is unlikely that this is so. 12RP 15. Defendant was sentenced on two serious violent offenses under RCW 9.94A.589 and the trial court could have made the ruling that the two offenses were not the same criminal conduct. Had the trial court done so, defendant would have been sentenced to a higher score with the more serious offense counted against the other and the sentences run consecutively under RCW 9.94A.589(1)(b).

attempted murder in the second degree was complete and each offense was committed with a separate weapon.

In ***State v. Davis***, the Court held that because two different weapons were used, the sequential events constituting attempted murder and first degree assault were not the same in fact. ***State v. Davis***, 174 Wn. App. 623, 634, 300 P.3d 465 (2013). In that case, the defendant used a pistol to shoot his victim resulting in the assault charge. *Id.* The substantial step required for the attempted murder was completed when the defendant retrieved a shotgun and moved toward the same victim with the shotgun aimed at his direction. *Id.* The Court relied on the fact that the pistol and shotgun were two different weapons and thus different evidence proved the two crimes. *Id.*

Here, the defendant also used two different means to commit two separate criminal acts. The first act of attempted murder in the second degree was accomplished with a scarf as a ligature. As argued above, defendant completed the substantial step towards murder when he went into Mejia's bed with the scarf, wrapped it around both of his hands, and looped it around her neck. This was the weapon or instrument he intended to use to kill her, as expressed by his statements that he had to kill her, while approaching her with the weapon in his hands. The second criminal act, the assault in the first degree, was committed with his bare hands. He manually strangled Mejia with his hands, putting pressure on her neck which caused ringing in her ears, a sharp pain in her head, and loss of

vision. 6RP 49. Defendant's attempt to kill by strangling Mejia with a ligature, then manual strangulation with bare hands which caused her pain were two separate acts committed with two distinct means. As in ***Davis***, the State provided separate evidence of each act. Mejia's testimony regarding the acts on the bed with the scarf, defendant's statements during that time that he had to kill her, and the evidence of the scarf itself were sufficient for a jury to find defendant guilty of attempted murder in the second degree. 6RP 44-47, 97. Her testimony regarding the second act of manual strangulation and the physical effects she felt during that act was sufficient for a jury to find defendant guilty of assault in the first degree. 6RP 48-50.

Defendant cites ***In re Orange*** in arguing that attempted murder and first degree assault are the same in law and in fact. ***In re Orange***, 152 Wn.2d 795, 820, 100 P.3d 291 (2004), Brief of App. 15-16. However, as this Court pointed out in ***Davis***, ***Orange*** does not stand for the principle that in all scenarios the two crimes are the same; rather, the analysis in that case was fact specific. ***Davis***, 174 Wn. App. at 634. Where the Court in ***Orange*** held that the two crimes were the same, the facts showed the defendant used the same weapon and in fact, the same bullet to both assault and murder the same victim at the exact same moment in time with no gap in between. *Id.* Those facts are distinguished from the present case in that defendant here used two different means at two different times with a pause in between each criminal act wherein new intent was formed.

The crime of assault in the first degree began after the crime of attempted murder was complete and defendant used two different means to accomplish the different criminal acts, thus the crimes were not identical in fact. Because the two crimes were neither identical in law nor in fact, defendant's convictions and sentence for the two distinct crimes do not violate double jeopardy and should be affirmed.

2. THIS COURT SHOULD DECLINE TO ADDRESS THE AWARD OF APPELLATE COSTS BECAUSE THE ISSUE IS NOT RIPE; THE STATE HAS YET TO SUBSTANTIALLY PREVAIL AND HAS NOT SUBMITTED A COST BILL TO WHICH DEFENDANT MAY OBJECT.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *See* ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016); *see also* ***State v. Nolan***, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); RAP 14.2. The question is not whether the Court can decide to order appellate costs but rather, when and how the Court will order appellate costs.

The legal principle that convicted offenders contribute toward the costs of the case, including the costs of appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including

that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). Requiring a defendant to contribute toward paying for appointed counsel under this statute does not violate or even "chill" the right to counsel. ***State v. Barklind***, 87 Wn.2d 814, 818, 557 P.2d 314 (1977).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. RCW 10.73.160(1). In ***Blank***, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). ***Blank***, 131 Wn.2d at 239.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See* ***Blank***, 131 Wn.2d at 242; *see also* ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009) (*citing* ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *See* ***Baldwin***, 63 Wn. App. at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). "A defendant's indigent status at the time of sentencing does not bar an award of costs." ***Crook***, 146 Wn. App. at 27. Likewise, the proper time for findings "is the point of collection and when sanctions are sought

for nonpayment." *See* ***Blank***, 131 Wn.2d at 241–242; *see also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999).

It is only after the State has prevailed on appeal that RAP 14.2 affords the appellate court discretion in awarding costs. ***Nolan***, 141 Wn.2d at 626. In ***Nolan***, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. The Court in ***Nolan*** was explicit in that disposition of the appeal is required prior to ruling on appellate costs. *Id.* at 625. "[T]he first step in determining if costs under Title 14 of the Rules of Appellate Procedure may be awarded in a criminal appeal is to determine if the State is the 'substantially prevailing party.'" *Id.* Defendant's objection to appellate costs in his opening brief prematurely raises an issue that is not before the Court. Brief of App. 17-19. Defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail and if the State files a cost bill.

The defendant has the initial burden to show indigence. *See* ***State v. Lundy***, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency "must do more than plead poverty in general terms" in seeking remission or modification of LFOs. ***State v. Woodward***, 116 Wn. App. 697, 704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *See* ***Woodward***, 116

Wn. App. at 703-04; *see also* ***Bearden v. Georgia***, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976).

The imposition of LFOs has been much discussed in the appellate courts lately. In ***State v. Blazina***, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *See Id.* at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. ***Blazina***, 182 Wn.2d at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. The majority of criminal defendants are represented at public expense at trial and on appeal. To be represented at public expense in trial or on appeal, a defendant must be found to be indigent. *See generally* ***Griffin v. Illinois***, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891 (1956). Thus, the majority of the defendants taxed for costs under RCW 10.73.160 are indigent. Additionally, subsection 3 specifically includes "recoupment of fees for court-appointed counsel."

RCW 10.73.160(3). It stands to reason then, that the defendants referenced by subsection 3 have been found indigent by the court.

Defendant argues that because he was found indigent at trial, there should be a presumption of indigency upon appeal and based on this, the Court should decline any future requests for costs. Brief of App. 18. Under defendant's argument, the Court should excuse any defendant found indigent at trial from payment of all costs at all stages, including appeal. This would, in effect, nullify RCW 10.73.160(3).

As ***Blazina*** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, the court in ***Sinclair*** points out, the Legislature did not include such a provision in RCW 10.73.160. ***Sinclair***, 192 Wn. App. at 385. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *Id.* at 386 (citing RCW 10.73.160(4)).

In this case, the State has yet to "substantially prevail," nor has it submitted a cost bill to which the defendant may object on the grounds of manifest hardship. Therefore, this Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence and to decline to review defendant's objection to appellate costs until and if the State substantially prevails and the State submits a cost bill.

DATED: January 9, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.11.17 Theresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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